BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PENNIE JO COUCH	)	
Claimant	)	
VS.	)	
	)	Docket No. 155,019
SUPERIOR INDUSTRIES INTERNATIONAL	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant requested review of the Award entered by Administrative Law Judge John D. Clark dated October 21, 1994. The Appeals Board heard oral argument on April 11, 1995 in Pittsburg, Kansas.

APPEARANCES

Claimant appeared by and through her attorney, Fred Spigarelli of Pittsburg, Kansas. Respondent, a qualified self-insured, appeared by and through its attorney, John I. O'Conner of Pittsburg, Kansas.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge found that claimant's back injury was only temporary and denied claimant permanent partial disability benefits. Claimant asks the Appeals Board to review the finding of nature and extent of disability. That is the only issue on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the appeals Board finds:

The Award entered by the Administrative Law Judge should be modified.

Claimant worked for the respondent for approximately six months. While so employed, claimant worked in the feddling department where she would remove 25 pound wheels from a conveyer and place them onto a machine that cut the center hole into the wheel. After the hole was cut, claimant would remove the wheel from the machine, clean it, and place it onto another conveyor. The job required claimant to bend, twist, and lift the entire shift. Claimant would handle between 200 and 300 wheels per day. In March 1991, claimant's low back began to hurt while she was performing her job. The following day she reported her back symptoms to respondent and sought medical treatment from her family physician who took her off work. In addition, claimant began seeing a chiropractor. Claimant also eventually consulted Herbert M. Sisk, D.O., and with the company physician, Hish s. Majzoub, M.D. In late May 1991, Dr. Sisk released claimant to return to work. Claimant reported to work with Dr. Sisk's release and was advised she needed a release from the company doctor before she could return to work. Respondent scheduled claimant another appointment with Dr. Majzoub to obtain that needed release. However, claimant testified that when she reported to work with Dr. Majzoub's release she was terminated because she did not return to work when Dr. Sisk released her. Because of her termination, claimant last worked for the respondent on March 25, 1991.

Claimant testified she did not believe she could return to her former position because her back does not feel as strong as it was before the accident and she believes she could not tolerate the lifting, twisting or bending that the job required. According to claimant's description of the job, she would not be able to perform it without violating the restrictions provided by Drs. Lewis and Majzoub as set forth below.

Claimant is a high school graduate and since entering the work force has worked as a liquor store clerk; in a packing house; as a dishwasher, laundry aide and nurse's aide in a nursing home; as a salad preparer and cashier at a pizza restaurant; and as a seamstress in a clothing factory.

Following the March 1991 injury, claimant worked from August to October 1992 for Walmart as a cashier. she does not recall her hourly wage rate at Walmart. She next worked for a construction company patching walls from August 1993 through October 1993 when she was laid off due to lack of work. At that job, it appears claimant's ending wage was either $5.75 or $6 per hour. She then worked for National Mills where she thinks she earned $5.50 per hour for one week before Christmas 1993, and was again laid off. At the time of her deposition in April 1994, claimant was working on Fridays and Saturdays as a bartender at a local lounge where she earned $60 per week, plus $8 to $10 in tips per day. During that same deposition, claimant testified she was not looking for other work because she was doing extra work at the lounge consisting of painting and other touch-up work. Claimant also testified she thought she would be given more hours to tend bar when her painting chores were completed.

Claimant presented the testimony of neurosurgeon Revis C. Lewis, M.D., who examined and evaluated claimant in November 1991 at her attorney's request. Dr. Lewis' physical examination revealed that claimant's range of motion of the lumbar spine was limited. The doctor diagnosed a lumbosacral strain probably of the facet or ligamentous type which constituted a 5 to 8 percent whole body functional impairment. Dr. Lewis believes claimant should not lift heavy weights and should limit lifting of 40 to 50 pounds to once per hour and 30 pounds to 3 to 5 times per hour. He also believes claimant should avoid bending more than ten times per hour and avoid lifting in awkward positions. He believes those restrictions are permanent.

Respondent presented the testimony of Herbert M. Sisk, D.O. Dr. Sisk, who maintains a general medical practice, first saw claimant on April 29, 1991, when she sought a second opinion. At that time claimant told the doctor that she had recently injured her back while working for the respondent, that she had developed increasing pain over the following days, and that she had previously sought treatment at a hospital emergency room. Upon examination, Dr. Sisk found mild muscle spasm in the low back, but a negative straight-leg raising test result and normal range of motion. He next saw claimant on May 15, 1991 at which time he felt claimant's symptoms were possibly increased. At that visit, claimant had decreased range of motion in the lumbar spine and "equivocally positive straight leg raising bilaterally." Because her symptoms were persisting, the doctor ordered an MRI which was interpreted as normal. On May 24, 1991, Dr. Sisk saw claimant for the last time, diagnosed back sprain and released claimant to return to work without restrictions. At that time, he advised claimant that she should be rechecked if she had further symptoms or the symptoms recurred. He did not believe that claimant sustained permanent "disability."

Respondent also presented the testimony of neurosurgeon Hish S. Majzoub, M.D., who treated claimant upon respondent's referral. He first saw claimant on April 12, 1991 and obtained a history from her that she had injured her back approximately three weeks earlier while lifting wheels at work. Based upon his clinical examination, Dr. Majzoub diagnosed a lumbar sprain. When the doctor last saw claimant on June 7, 1991 her symptoms had improved and she was not experiencing much back or leg pain. At that time, he released claimant to return to work. By letter dated June 13, 1991 the doctor wrote respondent that claimant could return to work on July 10, 1991. On June 26, 1991 the doctor wrote the respondent to advise that claimant was released to return to work on June 10 rather than July 10, 1991.

Although Dr. Majzoub believes that a lumbar sprain produces no residual deficit and, therefore, no impairment of function, at claimant's attorney's request he completed a form entitled Functional Capacities Evaluation wherein he indicated that claimant should limit her activities. In that document, he noted claimant should limit her lifting of 10 to 30 pounds to 3 to 5 times per hour; limit lifting 40 to 50 pounds to 1 to 2 times per hour; limit lifting over 50 pounds to only 1 time per hour; avoid all lifts over 90 pounds; limit bending, stooping, twisting, squatting and kneeling to 3 to 5 times per hour; limit sitting and standing to 1 hour at a time and 2 to 3 hour per day; and limit standing to 1 hour at a time up to a maximum of 2 hours per day. When asked why he placed restrictions upon claimant if he believed claimant had no impairment from her black injury, Dr. Majzoub stated that the restrictions were needed to protect claimant from reinjury and that he would not have given her those if he were not convinced she had a low back problem. He also indicated that his opinion of the existence of permanent impairment would change if claimant had continued to experience back pain or muscle spasm after he last saw her.

Based upon the above evidence, the Administrative Law Judge determined that claimant's injury was only temporary and, therefore, claimant was not entitled to permanent partial disability benefits. The Appeals Board disagrees and finds that it is more probably true than no that claimant sustained a permanent low back injury while working for the respondent that has resulted in permanent physical impairment and work restrictions and limitations. This conclusion is based upon the opinions of Drs. Lewis and Majzoub. Both doctors agreed that claimant should follow work restrictions and limitations as the result of her low back condition. In addition, Dr. Lewis unequivocally testified that claimant had a 5 to 8 percent whole body permanent functional impairment, whereas Dr. Majzoub testified

that claimant would have impairment and disability, in his opinion, if she had continued to experience back pain which she has established.

Because her s is an "unscheduled injury" claimant's entitlement to permanent partial disability benefits is governed by K.S.A. 1990 Supp. 44-510e, which provides:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Claimant presented the testimony of Jerry D. Hardin, the only person to testify regarding claimant's labor market and the loss caused by her low back injury. Mr. Hardin testified that both Dr. Majzoub's and Dr. Lewis' work restrictions generally limited claimant to the medium exertion category of labor. Using Dr. Majzoub's restrictions, Mr. Hardin believes that claimant's ability to perform work in the open labor market has been reduced by 25 to 35 percent, whereas using Dr. Lewis' restrictions the reduction is 35 to 45 percent.

Mr. Hardin also testified that he believes claimant retains the ability to earn 44.50 per hour in unskilled entry level positions. He felt that opinion was supported by claimant's wage history which indicated her job with the respondent was the only job she had ever held which paid more than minimum wage. The parties stipulated that claimant's average weekly wage on the date of accident was $309.88

Based upon the entire record, the Appeals Board finds that claimant has sustained a 35 percent loss of her ability to perform work in the open labor market and a 23 percent loss of ability to earn a comparable wage as a result of her work-related injury. The Appeals Board finds that claimant retains the ability to earn approximately $6 per hour or $240 per week, as indicated by the jobs she has obtained following her termination by the respondent.

Although it is not required, in this instance the Appeals Board gives equal weight to both loss of ability to perform work in the open labor market and loss of ability to earn a comparable wage and finds that claimant has sustained a 29 percent permanent partial general disability for which she should be awarded benefits.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated October 21, 1994, should be modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Pennie Jo Couch, and against the respondent, Superior Industries International, a qualified self-insured, for an accidental

injury which occurred March 25, 1991, and based upon an average weekly wage of $409.88, for 11 weeks of temporary total disability compensation at the rate of $206.60 per week or $2,272.60, followed by 404 weeks at the rate of $59.91 per week or $24,203.64 for a 29% permanent partial general disability, making a total award of $26,476.24.

As of June 28, 1996, there is due and owing claimant 11 weeks of temporary total disability compensation at the rate of $206.60 per week or $2,272.60, followed by 263.57 weeks of permanent partial disability compensation at the rate of $59.91 per week in the sum of $15,790.48, for a total of $18,063.08 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $8,413.16 is to be paid for 140.43 weeks at the rate of $59.91 per week, until fully paid or further order of the Director.

All other orders contained in the Award dated October 21, 1994, to the extent they are not inconsistent with the above, are adopted by the Appeals Board as if fully set forth herein.

IT IS SO ORDERED.

Dated this ____ day of August, 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Fred Spigarelli, Pittsburg, KS
John I. O'Conner, Pittsburg, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director